

Study Plan

House Joint Resolution No. 37

Prepared for the Local Government Subcommittee
of the
Education and Local Government Interim Committee

by
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INTRODUCTION

Of Montana's 93.156 million acres, about 26.14 million (28 percent) are under the jurisdiction of the federal government and more than 5 million (5.4 percent) comprise state land, leaving around 62 million acres (about 67 percent) in private ownership. Privately-owned land is made up of vast, sweeping ranches, small lots in town, and everything in between. How that private land is divided has been of interest to legislators since the First Legislative Assembly convened at Bannack in a frigid December 1864, shortly after which "An Act concerning Partitions of Real Estate" was approved on February 9, 1865. It was Montana Territory's first subdivision bill. Countless (who would want to count?) bills have been considered by subsequent legislative assemblies and the subject of dividing land has become increasingly complex as Montana's economic landscape has changed and as the population has grown and shifted.

The latest legislative measure to address subdivision of land recognizes the complexity of subdivision law and the need for clarification after decades of piecemeal amendments. House Joint Resolution No. 37 (HJR 37), sponsored by Representative Mark Noennig, requests that an interim committee review the Subdivision and Platting Act.

This document is intended to provide background information and study options for the Local Government Subcommittee of the Education and Local Government Interim Committee, the entity to which HJR 37 has been assigned.

HJR 37

Genesis of HJR 37

As many study resolutions do, HJR 37 wended its way through the legislative process during the waning days of the 2003 Legislative Session. The measure grew out of another bill that Rep. Noennig sponsored, House Bill No. 370 (HB 370).¹ HB 370 was not intended to make exhaustive changes to the Subdivision and Platting Act, but to provide a couple definitions and clarifications, and to

¹ Rep. Wanzenried sponsored a similar bill, House Bill No. 586, in the 2001 Session. The House Natural Resources Committee unanimously sent HB 586 to the House floor, where it failed to pass a Second Reading vote, 43-56.

consolidate provisions governing minor subdivisions into one section.

During the hearing in the House Natural Resources Committee, HB 370 received support from the Montana Association of Realtors, the Montana Smart Growth Coalition, the Montana Environmental Information Center, and the Montana Building Industry Association. Despite opposition from the Stillwater County Planner and the Montana Association of Registered Land Surveyors, who warned of the bill's unintended consequences, the committee sent the bill to the floor of the House where it received a favorable 81-18 vote on Third Reading. However, discussions with the opponents and with Senator McGee, a Registered Land Surveyor, prompted Rep. Noennig to withdraw HB 370 and request HJR 37.

Intent of HJR 37

In the Senate Local Government Committee hearing for HJR 37 and in a memo to the Legislative Council urging the members to assign the study to an interim committee, Rep. Noennig made the following points:

- >Testimony against HB 370 indicated that the bill would have eliminated the "remainder doctrine", a concept that is not expressly provided for in statute but that is used by some local subdivision review entities to determine whether the land that is left in a tract after a subdivision is carved out is subject to review.
- >The term "minor subdivision" is used many times in the law but is never defined, nor is it clear when a minor subdivision should be reviewed.
- >Subdivision law is interpreted and applied differently in different counties and some review entities use a summary review procedure that is not well defined in statute.
- >The ability of a local government to make decisions about minor subdivisions should be made clear.
- >The law should allow for unique local regulations but how those regulations are implemented should be consistent.

HJR 37's Rank in Study Poll

All study resolutions passed by the Legislature are subject to a polling process in which legislators are asked to rank study resolutions in order of importance. HJR 37 ranked ninth out of thirteen studies subject to the polling process.

What HJR 37 Says

The body of the resolution requests that an interim committee or staff be assigned to "review Title 76, chapter 3, MCA, and make recommendations for legislation to facilitate the consistent application of

the laws by revising that chapter in a way that is clear, concise, logically organized, and in conformance with the Bill Drafting Manual published by the Legislative Services Division."

The Preamble provides further insight into the reasons behind the resolution with the following statements:

Clear, concise, and logically organized laws benefit all Montanans by increasing efficiency, reducing confusion, minimizing litigation, and providing for consistent application of the laws.

In recent legislative sessions, sections of Title 76, chapter 3, MCA, the Montana Subdivision and Platting Act, have been amended several times.

This piecemeal approach to amendment of the Montana Subdivision and Platting Act has resulted in laws that are not always clear, concise, logically organized, or consistently applied.

For example, the procedures for review of minor subdivisions are codified in two different parts of Title 76, chapter 3, MCA.

For example, section 76-3-103, MCA, defines terms that are not used in the Montana Subdivision and Platting Act

For example, the term "minor subdivision" is used and not defined in the Montana Subdivision and Platting Act.

HJR 37 also provides that all aspects of the review be completed prior to September 15, 2004 and that the final results of the review be reported to the 59th Legislature.

THE SUBDIVISION AND PLATTING ACT

The Montana Subdivision and Platting Act is codified in Title 76, chapter 3 of the Montana Code Annotated.

Part 1

Section 76-3-102, MCA, articulates the purpose of the Act:

It is the purpose of this chapter to:

- (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
- (2) prevent overcrowding of land;
- (3) lessen congestion in the streets and highways;
- (4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;
- (5) require a development in harmony with the natural environment;

- (6) promote preservation of open space;
- (7) promote cluster development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services;
- (8) protect the rights of property owners; and
- (9) require the uniform monumentation of land subdivisions and transferring interests in real property by reference to a plat or certificate of survey.

Section 76-3-103 provides numerous definitions--among them the definition of "subdivision" which reads:

"Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

Part 2

Part 2 provides the conditions under which certain divisions of land are exempt from the Subdivision and Platting Act.

Part 3

Part 3 addresses the actual transfer of subdivided land, including filing requirements for the final subdivision plat and the conditions a subdivider must meet in order to sell lots in a proposed subdivision.

Part 4

Part 4 provides for the survey and platting requirements for subdivided lands, including monumentation and certificates of survey.

Part 5

Section 76-3-501, MCA, provides, in part:

Before July 1, 1974, the governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for the orderly development of their jurisdictional areas; for the coordination of roads within subdivided land with other roads, both existing and planned; for the dedication of land for roadways and for public utility easements; for the improvement of roads; for the provision of adequate open spaces for travel, light, air, and recreation; for the provision of adequate transportation, water, and drainage; subject to the provisions of 76-3-511, for the

regulation of sanitary facilities; for the avoidance or minimization of congestion; and for the avoidance of subdivision which would involve unnecessary environmental degradation and the avoidance of danger of injury to health, safety, or welfare by reason of natural hazard or the lack of water, drainage, access, transportation, or other public services or would necessitate an excessive expenditure of public funds for the supply of such services.

Subsequent sections in Part 5 address minimum standards for local subdivision regulations, require the regulations to include procedures for the summary review and approval of subdivision plats containing five or fewer parcels under certain circumstances, address local option cluster development, and, with certain exceptions, prohibit a local governing body from adopting a rule under Part 5 that is more stringent than state regulations or guidelines that address the same circumstances.

Part 6

Part 6 outlines the local subdivision review procedure. This is where the process is established and where the timelines under which both the subdivider and the review authority operate are located. Part 6 includes a review procedure for minor subdivisions² and conditions under which a subdivision may be denied or conditionally approved. This part also contains specifics regarding the park dedication requirement and a procedure for a subdivider to sue a governing body for a decision, action, or order that the subdivider considers arbitrary or capricious.

STUDY TOPICS AND OPTIONS

During the course of this study, the following questions should be addressed:

1. What is the remainder doctrine? How did it come about? How is it used?
2. Should the remainder doctrine be clarified in statute?
3. Should the term "minor subdivision" be defined in the Subdivision and Platting Act and what should that definition be?
4. What are the technical changes that were made to the Act in HB 370 and is there consensus to start with a bill that accomplishes at least that?
5. How much discretion should local governments have in developing local regulations? Does there need to be more direction to local governments in statute? Less direction?
6. Are the time frames for the review processes appropriate and consistent?
7. Would it be appropriate for some consistency to be applied in the assignment of bills

²As has been noted previously, no official definition exists in the Subdivision and Platting Act for "minor subdivision". However, the catchline for section 76-3-609, MCA, reads: "Review procedure for minor subdivisions" and goes on to provide review requirements for "[s]ubdivisions containing five or fewer parcels in which proper access to all lots is provided and in which there is not any land to be dedicated to the public for parks or playgrounds..."

- that amend Title 76, chapter 3 to certain session standing committees?³
8. Others?

The Subcommittee has various options to choose from in determining the scope of this study. The options are presented here in ascending order of complexity.

Option A

This option would involve little to no policy decisions. If the Subcommittee chose this option, staff would draft a bill for the Subcommittee's review that simply corrects the technical problems in Title 76, chapter 3 as identified in HJR 37, namely:

1. strike terms that are defined but not used in the Act
2. consolidate the procedures for review of minor subdivisions into one part
3. general review of the Act for consistency with the Bill Drafting Manual

Option B

This option would consist of the technical corrections in Option A plus the items articulated in Rep. Noennig's memo to the Legislative Council, namely:

1. determining whether to establish a statutory basis for the remainder doctrine
2. devising a definition for "minor subdivision", avoiding any unintended consequences

Option C

This option would combine Options A and B and extend the review beyond what Rep. Noennig had contemplated to include additional aspects of Subdivision and Platting Act. It would involve:

1. examining and possibly amending the time frames provided in the Act
2. examining the subdivision review process and the order in which various phases of review occur and determining whether improvements can be made
3. assessing whether more or less guidance should be given to local governments in the statutes
4. ensuring that any changes contemplated will not conflict with the Sanitation in Subdivisions Act (Title 76, chapter 4)

Option D

This option would combine a thorough review of Title 76, chapter 3, as envisioned in Option C with a thorough review and possible amendment of Title 76, chapter 4.

It should be noted that Title 76, chapter 4 was the subject of intensive study and discussion during the

³ Subdivision and other land use bills are assigned to both the Local Government and Natural Resource Committees in the House and Senate. This assignment history may be one reason for the Act's piecemeal amending. In light of how complex subdivision laws are, it may be helpful for the Subcommittee to consider a recommendation to leadership that a decision be made to send these kinds of bills to one Committee or the other on a relatively consistent basis.

1999-2000 interim. The Montana Consensus Council facilitated monthly meetings during that period which were attended by representatives of the Department of Environmental Quality, the Montana Association of Realtors, the Montana Building Industry Association, local governments, local health officers, the Montana Environmental Information Center, engineers, and others. One of the outcomes of that process was Senate Bill No. 167, sponsored by Senator Emily Stonington in the 2001 Session, which generally revised the Sanitation in Subdivisions Act. SB 167 received no opposition in its Senate Local Government or its House Natural Resources hearing and easily passed both houses to become law.

INTERESTED INDIVIDUALS/ORGANIZATIONS

Staff identified the following individuals and organizations as potential interested parties in the HJR 37 study and all have been invited to comment:

- The Montana Association of Realtors
- The Montana Building Industry Association
- The Montana Association of Counties
- The Montana Smart Growth Coalition
- The Montana League of Cities and Towns
- The Montana Association of Planners
- The Montana Association of Registered Land Surveyors
- The Montana Environmental Information Center
- Representative Noennig, HJR 37 sponsor
- Representative Wanzenried, HJR 37 co-sponsor
- Senator McGee, HJR 37 co-sponsor
- Senator Wheat, HJR 37 co-sponsor
- Tammy McGill, Stillwater County Planner
- Dave DeGrandpre, Lake County Planner
- Bonnie Lovelace, Department of Environmental Quality

PROPOSED SCHEDULE

Subject to the Subcommittee's approval, the Subcommittee will meet in conjunction with the meeting schedule adopted by the Education and Local Government Committee. This proposed schedule should serve only as a guide with the understanding that additional items may be added and that other local government-related issues may occupy significant Subcommittee time.

October 2003 meeting -- Review, refine, and adopt study plan; receive background information on the Subdivision and Platting Act and the Sanitation in Subdivisions Act; identify problems with the subdivision review process as provided through public comment and through information submitted by Rep. Noennig; identify any additional study questions; determine scope of the study.

January 2004 meeting -- Report on the remainder doctrine; staff presentation of options to address the problems that were identified at October meeting and Subcommittee discussion of those options;

comment on options from interested individuals and organizations.

April 2004 meeting -- Subcommittee review of bill draft that incorporates the options selected at January meeting; public comment.

June 2004 meeting -- Subcommittee review of revised bill draft (if necessary).

September 2004 meeting -- Final bill draft review, final recommendations for consideration of full Committee.